

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CESAR ALDANA,

Plaintiff,

vs.

U.S. FINANCIAL MORTGAGE CORP. et al.,

Defendants.

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3:10-cv-00715-RCJ-RAM

ORDER

This is a standard foreclosure case involving one property. The Complaint is a forty-four-page MERS-conspiracy type complaint listing eleven causes of action. The case is not part of Case No. 2:09-md-02119-JAT in the District of Arizona but appears eligible for transfer. A motion to dismiss, a motion for summary judgment, and a motion to remand are pending before the Court. For the reasons given herein, the Court denies the motion to remand and grants the motions to dismiss and for summary judgment in part.

I. THE PROPERTY

Plaintiff Cesar Aldana gave lender U.S. Financial Mortgage Corp. (“U.S. Financial”) a \$142,980 promissory note, secured by a deed of trust (“DOT”), to purchase real property at 5732 Sun Valley Blvd., Sun Valley, NV 89433 (the “Property”). (*See* DOT, Mar. 10, 2005, ECF No. 17-1). U.S. Financial was the trustee. (*See id.*). Plaintiff defaulted and First American Title Insurance Corp., as agent for Quality Loan Service Corp. (“QLS”) filed a notice of default

1 (“NOD”). (*See* NOD, Feb. 8, 2010, ECF No. 17-2). BAC Home Loans Servicing, LP (“BAC”) substituted QLS as trustee over two months later. (*See* Substitution, Apr. 22, 2010, ECF No. 17-4). QLS scheduled a trustee’s sale for June 24, 2010, (*see* Notice of Trustee’s Sale (“NOS”) 1–2, May 24, 2010, ECF No. 17-5), and sold the Property to BAC on Sept 24, 2010, (*see* Trustee’s Deed 1–2, Oct. 4, 2010, ECF No. 17-6).

6 MERS had purported to assign the deed of trust and the beneficial interest thereunder to BAC on March 26, 2010. (*See* Assignment of DOT, Mar. 26, 2010, ECF No. 17-3). BAC purported to substitute QLS as trustee only after MERS purported to transfer the interest in the mortgage to BAC, but the substitution occurred approximately ten weeks after QLS had already filed the NOD.

11 **II. ANALYSIS**

12 The foreclosure may have been statutorily improper because even if MERS had the ability to transfer the beneficial interest to BAC, which is not clear, BAC only purported to substitute QLS after QLS filed the NOD. *See* Nev. Rev. Stat. § 107.080(2)(c). The affirmative claims fail for reasons given in other substantively identical cases. No nuances appear in this case in that regard.

17 Plaintiff has also filed a motion to remand for lack of jurisdiction. Plaintiff brings no federal causes of action directly, but he brings a state claim under NRS section 649.370, which is premised entirely on violations of standards that give rise to an independent federal claim under the Fair Debt Collection Practices Act (“FDCPA”). This claim supports federal jurisdiction for the following reasons.

22 First, there appears to be no private right of action under NRS section 649.370,¹ so the claim must be construed as a federal claim directly under FDCPA. Second, even assuming a

25 ¹Neither “damages,” “cause of action,” nor “attorney’s fees” appear anywhere in Chapter 649. The Chapter provides only for criminal penalties or administrative fines. *See* Nev. Rev. Stat. §§ 649.435, 649.440.

1 private state cause of action, although most federal-question cases are based on federal claims,
 2 federal-question jurisdiction can be based purely on a state claim if its resolution necessarily
 3 requires the construction of federal law:

4 The rule is well settled that a state claim “arises under” federal law “if the
 5 complaint, properly pleaded, presents a substantial dispute over the effect of federal
 6 law, and the result turns on the federal question.” *Guinasso v. Pacific First Fed. Sav.
 7 & Loan Ass’n*, 656 F.2d 1364, 1365–66 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020,
 8 102 S. Ct. 1716, 72 L. Ed. 2d 138 (1982). The “vast majority of cases brought under
 9 the general federal-question jurisdiction of the federal courts are those in which
 10 federal law creates the cause of action[.]” *Merrell Dow Pharmaceuticals Inc. v.
 11 Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986), but
 12 a case may also arise under federal law “‘where the vindication of a right under state
 13 law necessarily turn[s] on some construction of federal law.’” *Id.* (quoting *Franchise
 14 Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S. Ct. 2841,
 15 2846, 77 L. Ed. 2d 420 (1983)).

16 *Berg v. Leason*, 32 F.3d 422, 423 (9th Cir. 1994). In cases such as the present one, where the
 17 state claim directly incorporates the substance of federal law, *see* Nev. Rev Stat. § 649.370, and
 18 where the state claim raises no federal constitutional issues, federal-question jurisdiction exists
 19 only if the federal law that is incorporated into the state claim provides an independent federal
 20 claim:

21 In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S. Ct.
 22 3229, 92 L. Ed. 2d 650 (1986), the Court considered in detail the principles of
 23 removal jurisdiction when applied to a well-pleaded complaint that relies on a state
 24 cause of action which incorporates federal law as one of the elements of recovery.
 25 The Court held that in such a case, the state claim does not involve a substantial
 federal question unless the federal law incorporated in the state cause of action
 provides a federal private right of action for its violation. *Id.* 106 S. Ct. at 3237; *see*
 also *Utley v. Varian Assoc., Inc.*, 811 F.2d 1279 (9th Cir.) (applying *Merrell Dow*),
cert. denied, 484 U.S. 824, 108 S. Ct. 89, 98 L. Ed. 2d 50 (1987).

26 *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1394 n.4 (9th Cir. 1988). The FDCPA provides
 27 a private right of action. *See* 15 U.S.C. § 1692k. If NRS section 649.370 contained additional
 28 substantive bases for liability apart from FDCPA, then such bases of liability could be invoked
 29 without creating federal-question jurisdiction. But section 649.370 refers exclusively and
 30 coextensively to FDCPA for its substance and provides no basis for liability apart from that
 31 provided for in FDCPA, under which a private, federal right of action lies. The Court therefore

1 finds that even if a private cause of action lied under section 649.370, such a claim would
2 support federal-question jurisdiction. *Ethridge*, 861 F.2d at 1394 n.4.

3 Next, Plaintiff is diverse from all parties except First Centennial Title Co. and Cindy
4 Cook, and employee thereof. No claim lies against these Defendants, because they are alleged
5 only to have recorded the DOT. They are not alleged to have been involved in the foreclosure.

6 CONCLUSION

7 IT IS HEREBY ORDERED that the Motion to Remand (ECF No. 7) is DENIED.

8 IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 12) and the Motion
9 for Summary Judgment (ECF No. 17) are GRANTED in part and DENIED in part. All claims
10 are dismissed except that for statutorily defective foreclosure.

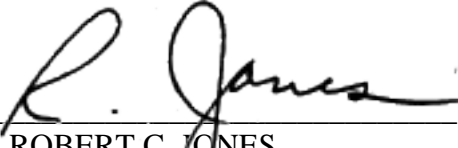
11 IT IS FURTHER ORDERED that Defendants will not transfer the Property or take any
12 action to evict Plaintiff or his tenants, if any, from the Property for one-hundred (100) days.
13 During this period, Plaintiff will make full, regular monthly payments under the note every thirty
14 (30) days, with the first payment due April 1, 2011. The amount of each payment will be
15 according to the monthly payment as of the date of the NOD. Plaintiff need not pay late fees or
16 cure the entire amount of past default at this time but may be required in equity to cure the entire
17 past default as a condition of any future permanent injunction.

18 IT IS FURTHER ORDERED that during the injunction period the parties will engage in
19 the state Foreclosure Mediation Program, if available. If not available, Defendants will conduct
20 a private mediation with Plaintiff in good faith. The beneficiary must send a representative to
21 the mediation with actual authority to modify the note, although actual modification is not
22 required. Plaintiff will provide requested information to Defendants in advance of the mediation
23 in good faith.

24 IT IS FURTHER ORDERED that Plaintiff's failure to make interim payments or to
25 participate in mediation will result in dismissal of the case.

1 IT IS SO ORDERED.

2 DATED: This 30th day of March, 2011.

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5 ROBERT C. JONES
6 United States District Judge
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